ASSOCIATED TRACTORS SDN BHD

v.

WOO SAI WA

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 11-7 OF 1995]
29 NOVEMBER 1996

CIVIL PROCEDURE: *Pleadings - Necessity for express pleadings - Defence not pleaded - Whether could be relied on by magistrate*

CONTRACT: *Assignment - Assignment of benefit to third party - Assignment of rights under guarantee - Guarantee given pursuant to hire purchase agreement - Hire purchase agreement terminated before assignment - Whether assignment valid - Contracts Act 1950, s. 79*

CIVIL PROCEDURE: *Appeal - Findings of fact - Interference by appellant court -Principles applicable*

CIVIL PROCEDURE: *Action - Cause of action - Doctrine of merger - When applicable*

The respondent was the guarantor of a hire purchase transaction between PHB Credit ('the assignor') and a third party ('the hirer'), whereby the assignor sold a tractor to the hirer on hire purchase for RM66,400. The hirer defaulted on the repayments and the assignor terminated the hire purchase agreement and repossessed the tractor. The assignor later assigned all its rights under the hire purchase agreement to the appellant. At this point in time, the guarantee given by the respondent under a separate letter of guarantee was not assigned to the appellant. The appellant filed a claim against the hirer and the respondent to recover the moneys outstanding under the hire purchase agreement. Consent judgment was entered against the hirer for RM20,522.34. The suit against the respondent was withdrawn. Of the judgment sum, RM18,522.34 remained unpaid. Subsequently, the assignor assigned its rights under the letter of guarantee to the plaintiff and informed the respondent accordingly. Pursuant to the assignment, the appellant sued the respondent for the balance sum of RM18,522.34. The respondent's defence was that: (i) he was not served with the notice of assignment; (ii) a letter of demand was not served on him; (iii) the assignment of the guarantee was null and void; (iv) the doctrine of merger applied to extinguish the appellant's claim as the appellant had obtained judgment against the hirer; and (v) the guarantee was

signed by him merely as a witness and thus the defence of *non est factum* applied. The magistrate dismissed the claim with costs.

The appellant appealed on the grounds that: (i) the magistrate had considered the defence of *non est factum* when it had not been pleaded; (ii) even if *non est factum* had been pleaded, there was no evidence to support it; (iii) a proper notice of demand had been served on the respondent; (iv) the assignment of the letter of guarantee was valid though it had been made after the termination of the hire purchase agreement; and (v) the magistrate erred in law by not considering the effect of the hirer's admission in the light of s. 79 of the Contracts Act 1950 ('the Act').

Held:

[1] It is trite law that the court should not take cognisance of a defence which has not been pleaded by the defendant. In this case, there was absolutely nothing in the defence regarding the defence of *non est factum*.

[2] An appellate court should not readily interfere with the findings of fact of the court of first instance, unless the court has fundamentally misdirected itself. The magistrate had misdirected himself when he held that no proper demand had been made on the respondent as his findings flew in the face of the documentary before the court.

[3] The assignment of the guarantee was valid as: (i) it was in writing and under the hand of the assignor; (ii) it was absolute; and (iii) the respondent was informed of the assignment *vide* the notice of demand.

[4] As the defence of *non est factum* was rejected, the guarantee was admissible evidence. Under the terms of the guarantee, the respondent agreed to, *inter alia,* protect the assignor against all loss and damage in the event of the hirer's default. By virtue of s. 79 of the Act therefore, the respondent had to discharge the liability of the hirer, including the liability under the consent judgment.

[5] The doctrine of merger did not apply as the parties were not the same and the cause of action was different, ie the action against the hirer was founded on the hire purchase agreement while the action against the respondent was based on the letter of guarantee.

Obiter dictum

Even if the defence of *non est factum* had been pleaded, there was no evidence to show that the respondent was illiterate or that he had exercised reasonable care in the circumstances of the case.

[Appeal dismissed.]

Cases referred to:

Anjalai Ammal & Anor v. Abdul Kareem [1969] 1 MLJ 22 ***(foll)***
Bank Bumiputra Malaysia Bhd v. Esah binti Abdul Ghani [1986] 1 MLJ 16 ***(refd)***
Bumiputra Lloyds Leasing Berhad v. Syarikat Teknomewa Sdn Bhd & 3 Ors [1980] 2 CLJ 23 ***(cit)***
Clarke v. Edinburgh & District Tramways Co Ltd [1919] SC (HL) 35 ***(refd)***
Compania Colombiana De Seguros v. Pacific Steam Navigation Co [1965] 1 QB 101 ***(foll)***
Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & 7 Ors [1991] 1 CLJ 522 ***(refd)***
Huges v. Fresh-Pack Fruit and Vegetable Market Pty Ltd and Levis [1965] WAR 199 ***(cit)***
Isaacs & Sons v. Salbstein and Another [1916] 2 KB 139 ***(foll)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667 ***(foll)***
Mohamed Abu Bakar s/o Yusof v. PA Syed Aboothahir s/o P Ahmed [1990] 1 CLJ 112 ***(foll)***
Mok Hin Wah v. United Malayan Banking Corporation [1983] 2 MLJ 610 ***(cit)***
Perwira Habib Bank Malaysia Bhd v. Wastecol Manufacturing Sdn Bhd & Ors [1988] 3 MLJ ***(cit)***
Sivalingam a/l Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 ***(foll)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 015 ***(foll)***
Torkington v. Magee [1902] 2 KB 427 ***(foll)***
Torkington v. Magee [1903] 1 KB 644 ***(foll)***
UMW Industries Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 ***(foll)***
UMW Industries (1985) Sdn Bhd (Dahulunya dikenali sebagai UMW (Malaya) Sdn Bhd v. Chang Too Sang) [1993] 1 CLJ 350 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Contracts Act 1950, s. 79

Other sources referred to:

Hire Purchase Law and Practice, RM Goode, 2nd edn, p 518
Sutton and Channon on Contracts, 7th edn, p 447
Chitty On Contracts, 25th edn, p 629
The Law Of Hire Purchase, AG Guest, MA, para 672, p 298

For the appellant - Ong Kim Buai; M/s Thakurta Low & Rajendra
For the respondent - AKJ D'Cruz; AKJ D'Cruz & Co

Reported by Anne Khoo

JUDGMENT

Suriyadi Halim Omar J:

On 26 August 1983 a hire purchase agreement was entered into between PHB Credit Sdn. Bhd. (hereinafter called 'the assignor') as owner, to let for hire a used Ford 555 tractor c/w Std. with the serial number of C649559 (hereinafter referred to as 'the said tractor') to one Woo Sai Kit (hereinafter called 'the hirer'). The total price of the transaction was RM66,400 payable by a deposit of RM17,000 and the balance of RM49,400 by 29 monthly instalments of RM1,647 commencing 26 September 1983 with a final instalment of RM1,637. On the same date ie, 26 August 1983 a letter of guarantee was signed by Woo Sai Wa (the defendant), whereby in consideration of the assignor agreeing to deliver to the hirer the said tractor under the terms of the agreement the defendant undertook and did guarantee upon demand payments of all sums which may become payable by the hirer. Similarly the defendant also undertook to indemnify the assignor against all losses, damage or expense which the assignor may sustain by reason of the hirer's neglect to observe or perform any of the stipulations and conditions under the said hire purchase agreement.

On 28 March 1984 the assignor terminated the agreement and repossessed the said tractor pursuant to the terms and conditions of the hire purchase agreement as the hirer had defaulted in the payments of the said instalments. About a month and five days later, ie, on 3 May 1984 by an assignment agreement, the assignor assigned to the plaintiff all its rights and benefits under the hire purchase agreement. The assignee (plaintiff) on account of that assignment agreement filed a statement of claim dated 4 November 1985 against the hirer and Woo Sai Wa (the present defendant) registered as Summons No. 583 of 1985. On 9 July 1986 the plaintiff duly obtained judgment by consent against the hirer only for the sum of RM20,522.34 with interest and cost. Perhaps realising that there was no cause of action against Woo Sai Wa (the defendant), purely based on the hire purchase agreement, the plaintiff withdrew the action against him. From this sum, RM18,522.34 remained unpaid.

On 30 September 1988 the assignor assigned all its benefits, rights, title and interest under the letter of guarantee which was dated 26 August 1983 to the plaintiff with the defendant being informed of that assignment. Pursuant to the assignment of the letter of guarantee a notice of demand dated 15 November 1988 was sent by the plaintiff through its solicitors to demand from the guarantor (defendant) the said balance sum of RM18,522.34. The plaintiff *vide* a statement of claim dated 14 December 1988, filed under Summons No. 83-1616-1988 alleged that the defendant had failed, refused and or had neglected to pay the plaintiff the said sum or any part thereof.

For a better understanding of how the sum of RM18,522.34 was derived I will elucidate by illustrating the particulars as laid down below:

Particulars

Cash price		$55,000
Less deposit paid		17,000
		38,000
Add Term Charges		11,400
		49,400
Less Instalment paid		1,646.67
		47,753.33
Less Statutory Rebate		5,663.23
		42,090.10
Add Late charges		582.24
		42,672.34
Add:		
Repossessions Fees	2,600	
Salesman's Commission for resale of machine	250	2,850
		45,522.34
Less:		
Nett proceeds from resale of the repossessed machine at 'AS IS WHERE IS' condition		25,000
		20,522.34
		=======

Of this sum of RM20,522.34 some payments were made leaving a balance of RM18,522.34 ie, the sum which is now being sought for by the plaintiff.

After a full hearing in which no less than 13 exhibits were tendered the learned magistrate in open court on 25 May 1995 eventually dismissed the writ with cost. The plaintiff subsequently filed in a notice of appeal and the matter finally came to me for hearing. Both the counsels have ably argued their point of views either in relation to the facts or the law which deserved to be considered and of which I must come to a certain finding. The grounds of appeal are as follows:

(i) the learned magistrate had considered the defence of *non est factum* when it was not pleaded in the statement of defence;

(ii) even if the defence of *non est factum* could be considered there was insufficient evidence to support it;

(iii) A proper notice of demand was made to the respondent;

(iv) the assignment was valid eventhough it occurred after the termination of the hire purchase agreement; and

(v) the learned magistrate erred in law in failing to consider the effect of the hirer's admission in the light of s. 79 of the Contracts Act 1950.

The respondent in contra distinction to the grounds of the appellants repeated his defence and alleged that:

(a) he was not served with the notice of assignment;

(b) a notice of demand was not served on him;

(c) that the assignment of the guarantee was null and void;

(d) as the appellant had obtained judgment against the hirer, the right to obtain judgment against the respondent thus had extinguished (doctrine of merger); and

(e) that the guarantee was signed by him merely as a witness effectually asserting the defence of *non est factum.*

As to the first ground it would be in order if I were to peruse the respondent's defence in order to detect whether the defence of *non est factum* had been pleaded. Paragraphs 1 and 2 are not relevant for this issue. Paragraph 3 is a non-admission of the plaintiff's statement of claim and requesting strict proof of the latter's contention. Paragraphs 4 and 5 revolved around the issue of repossession whilst para. 6 again is a traverse by the defendant requiring strict proof of para. 6 of the statement of claim. Paragraph 7 postulated the merger doctrine whilst para. 8 related to the assertion that the assignment was null

and void as prior to the assignment the hire purchase agreement had been terminated. Paragraphs 9, 10, and 11 are the usual denials of the debt and simultaneously stating that this action is frivolous, vexatious and an abuse of the process of the court. In a gist there is absolutely nothing in the defence which propagated the principle of *non est factum.*

It is trite law that the court should not take cognisance of a defence which has not been pleaded by the defendant. It would not be misplaced if I touch on the case of *Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22 where MacIntyre FJ discussing an issue not properly before the court remarked at p. 25:

> There is considerable authority in regard to the purpose and effect of particulars filed pursuant to O. 19 r. 7A of the Rules of the Supreme Court. At p. 31 of *Halsbury (3rd Edn.)* Vol. 3, the learned commentator has this to say:
>
> A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are, in effect, part of the pleadings under which they are delivered. ...
>
> Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the appellants were not obliged to call evidence to rebut.

Edgar Joseph Jr. J in *Mohamed Abu Bakar s/o Yusof v. PA Syed Aboothahir s/o P. Ahmed* [1990] 1 CLJ 112 at p. 115 said:

> It follows, therefore, that whenever a defendant has a special ground of defence or raises an affirmative case to destroy a claim he must plead specifically the matter he relies on for this purpose. As Buckley LJ said in *Re Robinson's Settlement, Grant v. Hobbs* [1912] 1 Ch 717 at p. 728 "The effect of the rule is, for reasons of practice and convenience, to require the party to tell his opponent what he is coming to Court to prove." Moreover, there is under O. 14 r. 14(2) specific provision relating to actions for recovery of immovable property and the need for particularisation.
>
> Strictly, therefore, the defendant should not have been allowed to lead evidence of the twofold defence he had advanced at the trial.

The last case I would like to touch on is the case of *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 MLJ 428 where at p. 432 Jemuri Serjan SCJ after analysing three cases regarding the issue of pleading said:

> All these three cases deal with a similar point, ie that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal.

On the above premises I see no necessity to entertain this defence by the respondent. In the event of an appeal and a different view is held whereupon the evidence must be scrutinised sad to say I am unable to accede to this legal principle due to the dearth of evidence or reason. I am unable to detect any evidence to affirm that he was an illiterate, or for that matter he had exercised reasonable care in the circumstances, and during the material time. It is trite law that the party who relies on that defence must be the very party who has to substantiate that defence and in the process convince the court that he had exercised reasonable care as was appropriate in the circumstances (see *Bumiputra Llyods Leasing Berhad v. Syarikat Teknomewa Sdn Bhd & 3 Ors* [1980] 2 CLJ 23; *Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & 7 Ors* [1991] 1 CLJ 522).

As regards the third ground of appeal, that no proper demand was made by the plaintiff to the respondent, greatly depends on the available facts. I would be on shaky ground if I were to interfere with the findings of facts of the magistrate unless I really comprehended the reasonings of that finding. To alleviate that possibility of committing a mistake, a thorough examination of the notes of evidence is necessary, which also entails perusing the exhibits. In *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113 Gunn Chit Tuan CJ at p. 117 commented:

> As regards the principles on which an appellate court may interfere with a lower court's findings of fact we would refer to the following passage in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* in which his Lordship stated as follows:
>
> > There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in Watt or *Thomas v. Thomas* [1947] 1 All ER 582 at p. 587:
> >
> > I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.
> >
> > II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

> III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co Ltd* [1919] SC (HL) 35 at p. 37:

> In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

In the case of *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 3 AMR 3506 the Court of Appeal at p. 3511 had this to say:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

With the above legal direction in mind it is thus encumbent upon me to study the grounds of decision and detect whether the learned magistrate fundamentally misdirected himself in the course of his duty. In the process of going through the notes and the grounds of decision I was satisfied that the learned magistrate had misdirected himself regarding P6 *vis-a-vis* P8. At p. 76 of the Record of Appeal the learned magistrate held that no proper demand was made by the plaintiff and in the course of coming to this conclusion cited the case of *Mok Hin Wah v. United Malayan Banking Corporation* [1983] 2 MLJ 610. That was all he said without even making a half hearted attempt to analyse 15 November 1988 notice of demand (P8). It is apparent that the learned magistrate was taken in by the submission of the respondent that the notice of demand received by him was a carbon copy. Certainly this is a misleading submission as the only carbon copy in relation to a notice of demand is that of a document dated 13 December 1984 which is P6 extended to him due to his capacity as a guarantor. The original notice of demand meant specifically for him is P8, (which is at p. 95 of the Record

of Appeal) dated 15 November 1988 requiring the defendant to pay the sum of RM18,522.34, owing to the default of the hirer. The plaintiff's counsel indicated that he was liable as he had undertaken to indemnify the owner against all losses, damage or expense which the owner had sustained by reason of the hirer's neglect to observe or perform any of the stipulations and conditions under the said Hire Purchase Agreement. At p. 97 is the Surat Akuan Mengepos document bearing the correct address of the defendant. After mulling over these facts I must come to a different conclusion to that of the magistrate and disturb his findings of facts as his findings flew against the documentary evidence submitted in court. I must conclude that he did receive an original notice of demand in the form of P8.

Regarding the fourth issue in that the learned magistrate had held that the assignment of the guarantee was invalid as it occurred after the termination of the hire purchase agreement, let me begin by admitting that 30 September 1988 assignment did take place after the termination of the hire purchase agreement. It related to the benefits, rights, title and interest under the letter of guarantee given by the defendant to the hirer. Whether this assignment is void or otherwise perhaps it would be in order if I were to reproduce s. 4(3) of the Civil Law Act 1956. This section reads:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor (emphasis supplied).

For purposes of this provision a legal chose in action certainly must mean the contractual rights that have been assigned, meaning all the personal rights over property which can only be claimed or enforced by legal action, and not by taking physical possession (see *Hire-Purchase Law And Practice* by RM Goode, LLB (Lond.) 2nd Edn. p. 518 and *Chitty On Contracts,* 25th Edn., p. 629). In *Torkington v. Magee* [1902] 2 KB 427 Channell J said:

> "Chose in action" is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is an expression large enough to include rights which it can hardly have been intended should be assignable by virtue of the sub-section in question, as, for instance, shares, which can only be transferred

> as provided by the Companies Acts. It is probably necessary, therefore, to put some limit upon the generality of the words; but I think that the necessary limitation is shewn by the considerations to which I have already referred, and also by the words of sub-s. 6 itself. I think the words "debt or other legal chose in action" mean "debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable.

Eventhough subsequently the decision of Channell J was reversed in *Torkington v. Magee* [1903] 1 KB 644 it was on a different premise ie based on a finding of fact. As to the interpretation of His Lordship of the phrase "chose in action" suffice to say it remained illuminating and useful for purposes of our case. In fact in *Compania Colombiana De Seguros v. Pacific Steam Navigation Co.* [1965] 1 QB 101 Roskill J at p. 117 said:

> That judgment was subsequently reversed upon the facts of the case by the Court of Appeal, but it is common ground that such reversal in no way affects the principles enunciated by Channell J. Indeed that judge's judgment has always been treated as one of the classic statements of the law on this topic.

The stumbling block for the case of the appellant regarding the provision of s. 4(3) of the Civil Law Act 1956 is that of the case of *UMW Industries* (1985) *Sdn Bhd (Dahulunya Dikenali Sebagai UMW (Malaya) Sdn Bhd v. Chang Too Sang)* [1993] 1 CLJ 350 where His Lordship Haji Abdul Malek bin Haji Ahmad J (as he then was) after discussing a certain text book and the case of *Huges v. Fresh-Pack Fruit and Vegetable Market Pty. Ltd. and Levis* [1965] WAR 199 held that the assignment was not valid as it occurred after the date of the termination of the hire purchase agreement. What cannot be denied is that this case gave recognition to assignment agreements between finance companies and dealers though limiting that bundle of rights only up to the ebbing seconds prior to the termination of the hire purchase agreement (Regarding this recognition see also *The Law Of Hire-Purchase,* by A.G. Guest, MA p. 298, para. 672 and *Hire Purchase Law & Practice,* by R.M. Goode 2nd Edn., p. 517). This completes the legal foundation that a right is assignable. But does that right to sue, claim or litigate merely exists before the agreement is terminated? To answer this question I seek solace from the case of *UMW Industries Sdn Bhd v. Ah Fook* [1996] 1 MLJ 365 at p. 370 where Chong Siew Fai CJ said:

> We have considered s. 4(3) of the Civil Law Act 1956 referred to by counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:

(1) that the assignment must be in writing under the hand of the assignor;

(2) that the assignment must be absolute and not by way of charge only; and

(3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

Further down at p. 371 para. G His Lordship said:

Section 4(3) of the Civil Law Act 1956 does not, and, for that matter, there is, as we understand, no law prescribing any limit of time within which notice must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action, eg a guarantor. All that the said s. 4(3) requires is that 'express notice in writing' be given.

By that same argument neither has that provision, nor for that matter any other laws, have prescribed any time limit as to when an assignment must take place, and as such I must part company with the conclusion of His Lordship propogated in *UMW Industries (1985) Sdn. Bhd. v. Chang Too Sang (supra)*. I therefore hold that the assignment was valid as:

1. the assignment was in writing and under the hands of the assignor;

2. the assignment was absolute; and

3. the respondent was informed of the assignment (see para. 3 of the notice of demand (P8) for the details).

It is a fact that *vide* the first summons No. 583 of 1985 the appellant had obtained a consent judgment dated 9 July 1986 against the hirer and pursuant to the judgment the hirer was adjudged a bankrupt. Since I have already rejected the defence of *non est factum*, as it was neither pleaded nor proved, the guarantee document signed by the respondent on 26 August 1983 in favour of PHB Credit Bhd pursuant to a hire purchase agreement dated 26 August 1983 is a reality and admissible evidence. As a consent judgment also was obtained against the hirer, and as the defendant had agreed to guarantee the creditor against all losses, damage and expense suffered by the latter in the event of a default by the hirer, s. 79 of the Contracts Act 1950 becomes relevant. This provision postulates:

A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of which default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

By virtue of the above provision the defendant will thus have to discharge the liability of the hirer; and of course the rights and obligations of the defendant will be governed by the terms and stipulations in the guarantee itself. (See *Perwira Habib Bank Malaysia Bhd v. Wastecol Manufacturing Sdn Bhd & Ors* [1988] 3 MLJ, *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani* [1986] 1 MLJ 16).

Pertaining to the doctrine of merger which is the last issue to be dealt by me for purposes of our case the respondent had submitted that after the judgment was recorded the guarantee contract had merged with the judgment and as such no further action should be entertained as against the respondent. Unfortunately the learned counsel did not go further to canvass that the concept will only apply if the parties were the same. In our case the facts clearly do not support the doctrine as:

1. the parties are not the same in that for the summons action where a consent judgment was obtained by the plaintiff it was against the hirer with the cause of action founded on the hire purchase agreement; and

2. for the second action the parties are the plaintiff and Woo Sai Wah a totally different party with the cause of action founded on the guarantee document which is a collateral security. On this point I refer to *Sutton and Channon On Contracts,* 7th Edn. where at p. 447 it explained:

> But it is quite clear that where the debts are not identical, or where the parties are not the same, there is no merger properly so called, and the bond or covenant only extinguishes the simple contract debt if it is so intended by the parties, that is, if the bond or covenant is given and accepted in accord and satisfaction of the simple contract debt. So if it is intended only as collateral security, the simple contract debt is not extinguished.

At the same page another illustration was given in this following form:

> A owed his bankers a sum of about 4,000. B had guaranteed this debt. The bankers took a bond from A and B for payment of this sum and all further advances to A. The bankers then sued A for the balance of his account as on a simple contract debt. A pleaded that the debt was merged in the bond. This was a bad plea, as the parties were not the same. B was a party to the bond, but not to the original debt *(Holmes v. Bell)* [1841] 3 M. & G. 213.

It will also be highly relevant to consider *Chitty On Contracts* General Principles where at p. 640 para. 1382 reads:

> Collateral security. If it appears on the face of the specialty or from the nature of the transaction that the specialty was intended only as an additional or collateral security, it will not operate as a merger. So, where a banker took from A, his customer, and B, his surety, a bond conditioned for the payment of all sums already advanced or thereafter to be advanced to A, it was held that the bond was evidently intended only as a collateral security, that therefore there was no merger and that A might be sued for the balance of his account as on a simple contract debt.

In the current case it was not a case of a plaintiff suing upon the original promise of demand but over another document (ie the guarantee) which was always intended as a collateral security and not co-extensive with the hire purchase agreement. The signatory of the guarantee or collateral security was not the hirer but a different person. Considering the legal ingredients needed for this principle of law as indicated above I therefore must reject the submission of the respondent that the doctrine applies in our case. As His Lordship Lush J said in *Isaacs & Sons v. Salbstein and Another* [1916] 2 KB 139 at p. 148:

> There is, however, no foundation whatever for the contention that because A recovers a judgment against B., who in truth never was a party to the contract at all, he cannot afterwards recover judgment on that contract against C., who was the real contracting party. Where judgment is recovered on a simple contract, that contract no doubt merges in the contract of higher degree which is evidenced by the judgment and which is a contract of record. But there is no ground for saying that a contract between A. and B., although it is a contract of record, merges a contract between A. and Z. They are two different contracts and therefore give rise to two different causes of action.

Having considered the facts submitted by both parties and the points of law relevant to this case I am satisfied that the appellant has proven its case and whereupon I allow this appeal with cost. I therefore order that the amount of RM18,522.34 be paid by the respondent guarantor to the appellant.